TROVER AND CONVERSION — WHAT CONSTITUTES CONVERSION — FACTOR'S LIABILITY FOR SALE AUTHORIZED BY THE APPARENT OWNER. — The defendant, a factor, received cotton from a customer in regular course. It belonged, in fact, to the plaintiff. The defendant, in ignorance of the plaintiff's title, sold the goods and paid the proceeds to the customer. *Held*, that the defendant had not converted the cotton. *Fargason Co.* v. *Ball*, 159 S. W. 221 (Tenn.).

The principal case is contrary to the well-settled rule that when a defendant knowingly consummates the sale of a plaintiff's property, though in good faith and in ignorance of the plaintiff's title, he is liable for converting it. *Consolidated Gas Co.* v. *Curtis* [1892], 1 Q. B. 495; *Flannery* v. *Harley*, 43 S. E. 765. See 21 HARV. L. REV. 408. Tennessee, however, is committed to the view expressed in the principal case. *Roach* v. *Turk*, 9 Heisk. (Tenn.) 708. Kentucky has also taken this position, claiming that the burden of examining the titles of all produce shipped to commission merchants for sale would drive them out of business. *Abernathy* v. *Wheeler*, 13 Ky. L. Rep. 730. A pronounced tendency to break away from the technical rule of conversion in the interests of commerce is evident in other cases. A bailee who redelivers unlawfully deposited property to the bailor, the apparent owner, is clearly not liable to the real owner. *Union Credit Bank* v. *Mersey Docks & Harlow Board* [1899], 2 Q. B. 205. A common carrier who receives goods from the apparent owner and innocently delivers them in pursuance of the bailment is not liable in trover. *Nanson* v. *Jacob*, 93 Mo. 331, 6 S. W. 246. A carrier indeed stands in need of protection because he must take all goods rightfully delivered to him. But since the necessities of business force commission merchants to rely on appearances they are in fact as greatly in need of protection as are boilers and common carriers.

WATERS AND WATERCOURSES — NATURAL LAKES AND PONDS — OWNERSHIP OF BED OF NAVIGABLE LAKE. — The state brought suit to quiet title to the bed of a lake, claiming that it was navigable in the technical sense. There were a number of sandbars and dead trees to obstruct travel. *Held*, that such a lake being navigable, title to the bed is in the state. *State* v. *West Tennessee Land Co.*, 158 S. W. 746 (Tenn.).

This case is commented upon in this issue of the REVIEW on p. 80.

BOOK REVIEWS.

PENAL PHILOSOPHY. By Gabriel Tarde. Translated from the fourth French edition. By Rapelje Howell. Boston: Little, Brown, and Company. 1912. pp. xxxii, 581.

This work deals, according to the statement of the author in his foreword, with three different matters: First, an attempt to reconcile moral responsibility with scientific determinism; second, an explanation of crime in conformity with the views of the author; third, an indication of needed legislative and penal reforms suggested by the views previously presented.

The attempt to reconcile scientific determinism with moral responsibility is based upon the necessity of finding some foundation for moral responsibility other than free will. In an increasing number of cases it is becoming recognized and admitted that the criminal could not have done other than he did. The defense is able, more and more strongly, to rely upon the alienist in its attempt to prove that fact. If that fact, then, is recognized as a defense, we face, according to the author, a very real social danger in that in an ever

increasing number of cases the doer of an act inimical to the interests of society must be given immunity. At the most he is to be treated merely as an unfortunate.

But if the conception of free will and of moral responsibility based upon it are disappearing before the progress of scientific determinism, what has scientific determinism to offer in its place as a justification for repressive measures. It is this: The malefactor is an enemy to society. As an enemy, though on the inside, means analogous to those used for the repression of an enemy on the outside should be used. In the case of such an enemy the only question asked is as to the utility of the means used. The responsibility of the enemy is not a factor to be considered. The same is true in the case of the malefactor within society. The question to be solved is the finding of the most effective means of repression. The personal characteristics of the malefactor are important only in so far as they help to solve this question.

But the elimination, for the purpose of determining the liability of the malefactor, of the question of responsibility which is thus accomplished is contrary to the actual belief of practically every individual in society. Is it possible to reconcile that belief with scientific determinism? Tarde believes that it is, and that the reconciliation may be accomplished by an investigation of what men have always meant when they have declared one of themselves responsible, criminally or civilly.

Following out this thought, he makes responsibility depend upon the existence of two conditions: (1) the personal identity of the supposed criminal, and (2) his social similarity to the members of that society which claims the right to condemn him. By personal identity is meant psychological identity, a continuity of mental states showing no marked variation. By social similarity is meant a similarity in beliefs, feelings, tastes, and inclinations.

Whatever one may say as to theoretical soundness of such a view, there is no doubt that it offers a test of liability more in accord with existing institutions than the utilitarian test of the positivists.

Tarde, in his explanation of crime, accepts Ferri's theory of factors by which crime is declared to be the result of three factors classified as follows: anthropological, physical, and social. It is perhaps natural, in view of his requirement of social similarity as a test of responsibility that he should emphasize the social factors. Many who would be classed by the positivists as criminals would not be so classed by Tarde because of lack of psychological identity or social similarity. Among the social factors he finds the chief, indeed almost the sole, cause of crime in the strong tendency to imitation found in every individual.

This does not prevent the criminal from having his distinguishing characteristics, however. Tarde says, "Perhaps one is born vicious, but it is certain that he becomes a criminal." In the becoming he necessarily develops certain traits as one does in becoming anything else. Hence the criminal has a professional type distinguished by the marks of his profession.

The chief reforms advocated are the abolition of the jury and the alteration of the death penalty. The whole institution of the jury is declared to be defective in its foundations. Its results are declared to be uniformly bad, and it is said to lack even the doubtful merit of reflecting public opinion. The rational basis of penal law is said to lie in public opinion. This statement is in accord with the foundation of the theory of responsibility before mentioned, but seems hardly in accord with the statement just referred to. With respect to the death penalty, though its legitimacy is maintained and the arguments against it declared weak, it is suggested that its effectiveness is destroyed by the prejudice against it which prevents it from being put into actual operation. Hence it ought either to be abolished, or the form of administering it ought to be changed so as to in some measure overcome the prejudice against its use.

The book is a splendid contribution to the subject it discusses. Sometimes the wealth of learning possessed by the author seems to lead him into fields the exploration of which adds but little to the discussion in hand and makes the book more difficult reading than it would otherwise be. The views advanced are founded upon a long experience as a magistrate, and are especially valuable to those who are engaged in the application of law as it is.

O. S. R.

A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS. By Arthur K. Kuhn. New York: Longmans, Green, and Company. 1912. pp. 173.

This little book is learned and interesting. After tracing the origin and development of the legal conception of a corporation in Ancient Times, in the Middle Ages, and in England, the author gives a summary of the laws of the principal countries of Continental Europe (excepting Austria and Russia) and of England and America, which relate to the organization and operation of corporations, considered with particular reference to the protection of creditors and shareholders. Within the limits of his space of course nothing more than a summary was possible, but in this summary the author has succeeded in giving a very clear presentation of the salient differences between (a) the law of Continental Europe and the Anglo-American law; (b) the laws of France and Germany and Italy and Spain and Switzerland; and (c) the laws of England and America.

The author prefers the German system — the thoroughness and *gelehrtheit* of the German naturally fascinates a scholarly mind — and seems to regard it as one to be applied generally. "What is required," he says, speaking of legislation and reform in England and America, "is an effective control over organization and administration; not a mere change in the association type" (p. 115). He considers that the German system, with its drastic penal laws, and with its provisions for publicity, and for a managing directorate, subject at all times to the control of the stockholders and the general supervision of the supervising council, affords the most effective guaranties for the protection of investor and creditor (p. 134). And, in accord with a widely current opinion of to-day, he assumes that "the overcapitalization of corporations has ever been one of the chief sources of evil resulting from the corporate form." As the author is considering the subject from the point of view of what is required for the protection of creditors and shareholders, this must mean that overcapitalization is an evil, so far as creditors and shareholders are concerned. But is this correct?

The author himself admits (p. 115) that "only the most ignorant will assume that the par value of a share of stock must necessarily be its real value." And is it not also true that only the most ignorant stockholder will so assume? The fact is that neither the creditor nor the *investing* stockholder ever measures the credit and responsibility of a corporation by its nominal capitalization, but solely by its assets and the character and ability of the men who are managing it. The creditor and the *investing* stockholder know that the capital stock, in so far as it exceeds the actual present assets of the corporation, represents merely an optimistic estimate as to its earning power. And looking at the matter broadly and beyond the interests of the creditor and investing stockholder of the particular corporation, must we not say that the evils of overcapitalization have been greatly overestimated, and that its advantages have been greatly underestimated or entirely disregarded? The panics of 1873 and 1893 did not result from the overcapitalization of corporations, nor were their evil effects accentuated by it. The Wall Street panic of 1884 affected